United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mailing

76-1420

To be argued by
BERNARD J. FRIED

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1420

UNITED STATES OF AMERICA,
Appellee,

—against—

KENNETH R. CHIN and ELIZABETH JANE YOUNG,
a/k/a ELIZABETH JANE YOUNG CHIN,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
Eastern District of New York,
United States Attorney,

BERNARD J. FRIED,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 3

1. The Search Warrant 3
2. The First Trial 6
   - A. The Government's Case 6
   - B. The Defense Case 8
3. The Second Trial 9
   - A. Motion to Dismiss Superseding Indictment 9
   - B. The Government's Case 10
   - C. The Defense Case 15
     1. Appellant Chin's Case 15
     2. Appellant Young's Case 15

ARGUMENT:

POINT I—The Search Warrant Was Properly Issued: The Supporting Affidavit Set Forth Probable Cause To Believe That The Firearm Was Located At The Union Street Apartment 17

POINT II—Neither The Doctrine Of Collateral Estoppel Nor Double Jeopardy Barred Prosecution Of Appellant Young On The Superseding Indictment 27

POINT III—The Instructions Of The District Court Were Correct 33

PAGE

POINT IV—There Was Sufficient Evidence To Sustain Chin's Conviction 46

CONCLUSION 50

TABLE OF CASES

Ashe v. *Swenson*, 379 U.S. 436 (1970) 29

Bastida v. *Henderson*, 487 F.2d 860 (5th Cir. 1973) 22

Curley v. *United States*, 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947) 49

Dandrea v. *United States*, 7 F.2d 861 (8th Cir. 1925) 22

Flynn v. *United States*, 284 U.S. 390 (1932) 30

Gresham v. *United States*, 407 F.2d 190 (9th Cir. 1968) 22

Fosberg v. *United States*, 351 F.2d 242 (9th Cir. 1965), *cert. denied*, 383 U.S. 950 (1966) 30

Glasser v. *United States*, 315 U.S. 60 (1942) 43, 46

Hamling v. *United States*, 418 U.S. 87 (1974) 30

Huddleston v. *United States*, 415 U.S. 814 (1974) 34

Illinois v. *Somerville*, 410 U.S. 458 (1972) 28

Kepner v. *United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904) 30

McAbee v. *United States*, 434 F.2d 361 (9th Cir. 1970) 49

People v. *Sirhan*, 494 P. 2d 1121 (S.Ct. Cal., en banc, 1972), *cert. denied*, 410 U.S. 947 26

Rosencrans v. *United States*, 165 U.S. 257 (1897) .. 44

Sealfon v. *United States*, 332 U.S. 575 (1948) 32

Sgro v. *United States*, 287 U.S. 206 (1932) 19, 22

PAGE

Siden v. *United States*, 9 F.2d 241 (8th Cir. 1925) 22

Stone v. *Powell*, — U.S. —, 96 S.Ct. 3037 (1976) 19

United States v. *Alfonso-Perez*, 535 F.2d 1362 (2d Cir. 1976) 34

United States v. *Archer*, 355 F.Supp. 981 (S.D.N.Y. 1972) 24

United States v. *Boyd*, 422 F.2d 791 (6th Cir. 1970) 23

United States v. *Cioffi*, 487 F.2d 492 (2d Cir., 1973) 33

United States v. *Craven*, 478 F.2d 1329 (6th Cir.), *cert. denied*, 414 U.S. 866, *rehearing denied*, 414 U.S. 1086 (1973) 47

United States v. *Dauphinee*, 538 F.2d 1, 5 (1st Cir. 1976) 19

United States v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969) 48

United States v. *Giacalone*, 541 F.2d 507 (6th Cir. 1976) 19

United States v. *Goldstein*, 479 F.2d 1061 (2d Cir. 1973), *cert. denied*, 414 U.S. 873 (1973) 28

United States v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973) 26

United States v. *Guillette*, Docket No. 76-1041, Slip op. 6099 (2d Cir., December 20, 1976) 31

United States v. *Jacobson*, Docket No. 76-1345, Slip op. 1021 (2d Cir., December 17, 1976) 31

United States v. *Jones*, 481 F.2d 653 (2d Cir. 1973) 35, 36, 37, 38, 42

United States v. *Karathanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, — U.S. —, 96 S.Ct. 3221 (1976) 19

PAGE

United States v. *Kirk*, 534 F.2d 1262 (8th Cir. 1976) 19

United States v. *Kramer*, 289 F.2d 909 (2d Cir. 1961) 32, 33

United States v. *LaVecchia*, 513 F.2d 1210 (2d Cir. 1975) 26

United States v. *Lucarz*, 430 F.2d 1051 (9th Cir. 1970) 23, 24

United States v. *McGowan*, 385 F. Supp. 956 (D. N.J., 1974) 28, 29

United States v. *Mallah*, 503 F.2d 971 (2d Cir. 1974) 32

United States v. *Maybury*, 274 F.2d 899 (2d Cir. 1960) 30

United States v. *Mendoza*, 487 F.2d 309 (5th Cir. 1973) 25

United States v. *Monica*, 295 F.2d 400 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962) 49

United States v. *Mulligan*, 488 F.2d 732 (9th Cir. 1973), *cert. denied*, 417 U.S. 930, 94 S.Ct. 2640 (1974) 23

United States v. *Nichols*, 89 F. Supp. 953 (W.D. Ark., 1950) 23

United States v. *Perez*, 22 U.S. (9 Wheat) 59 (1824) 28

United States v. *Rahn*, 511 F.2d 290 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1976) ... 21, 24

United States v. *Rappaport*, Docket No. 76-1291, Slip op. 423 (2d Cir., November 4, 1976) 45

United States v. *Rosenbarger*, 536 F.2d 715 (6th Cir. 1976) 19

United States v. *Samson*, 533 F.2d 721 (1st Cir. 1976) 24

PAGE

United States v. *Scott*, 464 F.2d 832 (D.C. Cir. 1972) 31

United States v. *Sevier*, 539 F.2d 599 (6th Cir. 1976) 19

United States v. *Steeves*, 525 F.2d 33 (8th Cir. 1976) 19, 20, 22, 25

United States v. *Taylor*, 464 F.2d 240 (2d Cir. 1972) 49

United States v. *Van Ert*, 350 F Supp. 1339 (E.D. Wis., 1972) 23

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1420

UNITED STATES OF AMERICA,

Appellee,

—against—

KENNETH R. CHIN and ELIZABETH JANE YOUNG, a/k/a ELIZABETH JANE YOUNG CHIN,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants, Elizabeth Jane Young Chin [1] and Kenneth Raymond Chin, appeal from judgments of conviction entered on September 17, 1976, in the United States District Court for the Eastern District of New York (Mishler, *C.J.*) following a five day jury trial. Young was convicted of one [2] count charging her with the un-

[1] Appellants are husband and wife. At the time of the offenses alleged in the indictments, however, they were not married. For clarity's sake, appellant Elizabeth Jane Young Chin will hereinafter be described, by her maiden name, as Elizabeth Jane Young.

[2] The jury found Young guilty of an additional count charging her with the unlawful transportation of another firearm (another Armalite AR-180 semi-automatic rifle). At the time of sentencing, the verdict was set aside and that count was dismissed pursuant to Rule 29, Fed. R. Crim. Proc. An appeal of this dismissal was taken by the Government and was consolidated with appellants' appeal of their convictions. This appeal, however, is being withdrawn.

lawful transportation to New York (her state of residence) of a firearm (Armalite, AR-180, .223 caliber, semi-automatic rifle) which she had obtained in California, in violation of Title 18, United States Code, Section 922(a)(3). She was sentenced to a three year term of probation. Chin was convicted of two [3] counts charging him with aiding and abetting in the unlawful transportation to New York of a firearm (Armalite AR-180, .223 caliber, semi-automatic rifle) obtained in California, and the unlawful receipt of that firearm in New York, both in violation of Title 18, United States Code, Sections 922(a)(3) and (2). Chin was sentenced to a three year term of probation on each count, the sentences to run concurrently.

On appeal, appellant Young does not challenge the sufficiency of the evidence but raises essentially three issues: (1) whether there was probable cause to support a search warrant issued by the United States Magistrate (and related questions); (2) whether the district court's denial of appellant Young's pretrial motion to dismiss the indictment on grounds of alleged double jeopardy and collateral estoppel was error; and (3) whether the district court correctly defined the term "resides" as used in 18 U.S.C. § 922(a)(3), and correctly refused to charge on the Congressional purpose of the statute (related to both contentions are claims concerning the exclusion of evidence).

---

[3] The jury found Chin guilty of two additional counts charging him with the unlawful transportation and receipt of another firearm (another Armalite AR-180 semi-automatic rifle). This verdict was also set aside and the counts were dismissed pursuant to Rule 29, Fed. R. Crim. Proc. at the time of sentencing. An appeal of this dismissal, which was taken by the Government and consolidated with this appeal, is being withdrawn. *Supra*, note 2.

Appellant Chin raises, as to himself, the sufficiency of the evidence to support his conviction. He also joins Young in her point regarding the District Court's charge on the meaning of "residence" and, in addition challenges the district court's aiding and abetting instruction and its instruction on the elements of the transportation count. Finally, he joins with Young on the search and seizure issue.

Statement of Facts

1. The Search Warrant

On October 3, 1975 a search warrant was issued by United States Magistrate Vincent A. Catoggio, Eastern District of New York, authorizing any special Agent of the United States Secret Service to enter Apartment 4B, 925 Union Street, Brooklyn, New York to search for an AR-180 semi-automatic rifle, serial number S-12585, being concealed there (A-19).[4] The warrant was issued on the basis of two affidavits signed by Special Agent Neal Findley of the Secret Service. In his first affidavit, Agent Findley stated that he had reason to believe that the weapon was being concealed in violation of 18 U.S.C. § 922(a)(6).[5] In part, his belief was based

---

[4] "A" as hereinafter used refers to pages in Appellants' Joint Appendix.

[5] 18 U.S.C. § 922(a)(6) provides, that:

"It is unlawful * * *

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness or the sale or other disposition of such firearm or ammunition under the provisions of this chapter."

upon an investigation which had disclosed that Young had purchased the rifle, in California, on July 29, 1975, by misrepresenting her address to be a Los Angeles residence (A-13), when in fact she lived in Jackson Heights, New York. He further stated that shortly thereafter, on August 30, 1975, appellant moved to the Union Street address.[6] In his affidavit, Agent Findley also referred to the supplemental affidavit, which was then sealed, but has ultimately been substantially disclosed (A-15). In

---

[6] Agent Findley's affidavit provided, in pertinent part:

1. An interview by Special Agents of the United Secret Service of Carl V. Copeland, Jr., a salesman at Coles Sporting Goods Store, Inglewood, California, a licensed firearms dealership, wherein he stated that he sold the above-described firearm, serial number S-12585 for $270 to a person who identified herself as Elizabeth Jane Young on July 29, 1975.

2. At the time of the purchase described in paragraph 1 above, Copeland advised that Elizabeth Jane Young identified herself by means of a California driver's license. N-3849891, which reflected her address to be 1555 6th Avenue, Los Angeles, California. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on June 11, 1974, Elizabeth Jane Young notified United States Postal Service authorities in Los Angeles, California to forward all mail addressed to her to 3306 92 Street, Apartment 5L, Jackson Heights, New York.

3. Further investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on August 30, 1974, Elizabeth Jane Young notified United States Postal Service officials of a change of address to 925 Union Street, Apartment 4B, Brooklyn, New York.

4. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that Elizabeth Jane Young presently resides at 925 Union Street, Apartment 4B, Brooklyn, New York. Such investigation included personal observation by Special Agent John Cunniff of the United States Secret Service of the premises above-described, which revealed the name "Young" on the mailbox for Apartment 4B.

this supplemental affidavit, Agent Findley stated that the investigation related to the forthcoming official visit of Emperor Hirohito of Japan to the City of New York (A-15). As additional support for the issuance of the warrant, Magistrate Catoggio was informed that appellant had earlier resided with one Joanne Miyamoto and that Miyamoto and another (Mary Kochiyama), had been attempting to gain access to the Emperor. It was further disclosed that Miyamoto and Kochiyama were members of a Japanese led political organization known for its position opposing a security treaty between the United States and Japan. Kochiyama was also linked to various violent extremist groups such as the Black Panther Party and the Black Liberation Army (A-17). These circumstances, in the opinion of Agent Findley, supported a potentially serious threat to the safety of a visiting head of state as defined in 18 U.S.C. § 3056.

On October 4, 1975, the warrant was executed (A-24) and an arsenal of weapons and ammunition, including the described firearm, was found and seized. Included among the seized weapons were the four firearms which became the basis of the indictments in this case; both the original indictment filed on November 11, 1975[7] (A-21-33) and the superseding indictment filed on April 19, 1976.[8] (A-31-35).

---

[7] On November 11, 1975 a two count indictment was returned charging appellants with conspiracy to transport the four weapons from California to New York, in violation of 18 U.S.C. § 922 (a)(3) [Count 1] and with the substantive violation of transporting them [Count II].

[8] On April 19, 1976, an eight count indictment was returned charging appellants with four counts of illegally transporting the weapons, individually, from California to New York, in violation of 18 U.S.C. § 922(a)(3), and with four counts of illegally receiving the weapons, individually, after they had been transported from California. Appellant Chin was charged, in each count with aiding and abetting either the transportation or receipt of the specified firearm, in violation of Title 18, U.S.C. § 2. All eight counts were submitted to the jury with respect to Chin; however, only the four transportation counts were submitted with respect to Young.

On February 23, 1976, Chief Judge Mishler, upon submission of affidavits from all parties, denied the motion to suppress the evidence which was seized pursuant to the search warrant on October 4, 1975 (A-36-41). In doing so, Chief Judge Mishler reviewed the procedure followed in obtaining the warrant (A-36-39), and held that the first affidavit was sufficient to establish probable cause to believe that the gun would be found in the premises to be searched [9] and that, therefore, the alleged misstatements in the supplemental affidavit were inconsequential.

2. The First Trial

A. The Government's Case

Upon the Government's motion, a severance was granted and appellant Young, was tried first. (T. (I) 78-79).[10] Because this trial resulted in a mistrial on the substantive count and an acquittal on the conspiracy count, the evidence adduced at the first trial is briefly summarized. It is included only because of its relevance to Point II of Young's brief on this appeal.

Special Agent Patrick G. McCool, of the Secret Service, described the search of appellants' apartment, on October 4, 1975, and identified three of the firearms

---

[9] This sole reliance on the first (and completely unsealed) affidavit is inferable from the opinion of Chief Judge Mishler in which he set forth only paragraph 1-4 of this affidavit. By omitting paragraph 5 which had incorporated the Supplemental Affidavit, Chief Judge Mishler quite clearly based his holding only on the first affidavit. Moreover, a reading of the opinion further supports this conclusion.

[10] "T. (I)" as used hereinafter refers to pages in the transcript of the first trial. The notation "T.(II)" will be used as reference to pages in the transcript of the second trial.

seized (T. [I] 19-32).[11] Thereafter, Carl Copeland, Jr. testified that on July 29, 1975, while working at a sporting goods store in Inglewood, California, he sold the AR-180 bearing serial number S-12585 to appellant Young and identified the Firearms Transaction Record that was prepared incident to the sale. Copeland then identified the Firearms Transaction Record that was prepared when the AR-180 bearing serial number S-12590 was sold by the same store to one Marc Kondo, on August 12, 1975 (T. [I] 36-38; 43-49; 50-52).

Through a series of United States Postal Service employees, it was established that, on June 11, 1974, Chin and Young had requested that their mailing address be changed from 1555 Sixth Avenue, Los Angeles, California to "c/o Chin", 3306 92nd Street, Number 46, Jackson Heights, New York, and that on August 30, 1974 they had again changed their address to Apartment 4-B, 925 Union Street, Brooklyn, New York (T. (I) 80-83; 90-94).

Martin Benedicto, a former gunsmith, identified a .30 caliber M-1 semi-automatic carbine[12] that both defendants had brought to him for repairs on September 6, 1975 (T. (I) 171-172). It was proven that this M-1 and the AR-7 had been registered, by Chin, with the New York City Firearms Control Board, after he had purchased them from one Michael Yanagita on August 21, 1975 and July 6, 1975, respectively (T. (I) 244-250). By stipulation, a sworn statement of Yana-

---

[11] The three firearms described by Agent McCool and marked in evidence as being found in the apartment were two Armalite, AR-180 semi-automatic rifles, serial numbers S-12585 (T.(I)31) and S-12590 (T. (I) 32), and an Armalite, AR-7, semi-automatic rifle, serial number 89474 (T.(I)29).

[12] Serial Number 5487136 (T.(I) 170).

gita was read in which Yanagita stated that he, a California resident, had sold both the M-1 and the AR-7 to Young when she visited him in California in August, 1975 (T. (I) 258).

The owner of appellants' apartment building testified that, according to the lease, they had been joint tenants in apartment 4-B, without interruption, from August 1, 1974 through the date of his testimony [April 13, 1976] (T. (I) 262-271). Moreover, an affidavit in which appellant Young swore (as of January 7, 1975) that she resided in Brooklyn was admitted (T. (I) 253).

B. The Defense Case

Jane Ozeki, testified that she had known appellants since 1971, and that in June, 1975 appellant Young had left New York, and stayed with her parents in California for approximately three months (T. (I) 286-290). Initially, Ozeki was not permitted to testify to any conversation that she had with Young about this trip (T. (I) 291). However, upon immediate reconsideration, the court permitted testimony that Young had come to her (Ozeki) and said she was "going him to her family in California" (T. (I) 298). On cross-examination, Ozeki admitted that Young had said nothing about changing her residence to California, nor that she had accomplished even the most elementary steps that would have indicated an intent to permanently relocate (T. (I) 299-306).

Charles H. Young, appellant Young's father, testified that his daughter had sojourned with him and his wife during the summer of 1975. He testified that she had stayed with them briefly, and had stated that she had wanted to work in California, but went to Los

Angeles shortly after arriving (T. (I) 340-342). Approximately two or three weeks after her mid-August arrival in California, she returned to New York (T. (I) 342). On cross-examination, Mr. Young conceded that his daughter had stayed with him only one week and had brought only one bag (T. (I) 349, 366). He further acknowledged that in July, 1975, she had lived at 925 Union Street, Brooklyn, New York; not in California. It was at this address where he reached her and to which he forwarded any mail she might have received at his house in California (T. (I) 355-358).

Following the defense summation, but prior to the Government rebuttal, Chief Judge Mishler, out of a stated overabundance of caution, withdrew all evidence relating to the "Kondo" AR-180 from the jury's consideration (T. (I) 489-505). Thereafter, following a full day of deliberations, the jury returned a verdict of not guilty on the conspiracy count [Count I] (T. (I) 607), and stated that it was deadlocked on the substantive count [Count II], as to which a mistrial was declared (T. (I) 630).

3. The Second Trial

A. Motion To Dismiss Superseding Indictment

Following the April 16, 1976, mistrial in the case against appellant Young, a superseding indictment was filed on April 19, 1976 (A-31-35) charging both Chin and Young with eight substantive counts, as described above (*supra* at p. 5, f.n. 9; A-31). On May 18, 1976, Young moved to dismiss this superseding indictment, contending that her acquittal on the conspiracy count which had been contained in the first indictment, collaterally estopped the Government from prosecuting the indictment. Alternatively, Young moved to dismiss

Counts Three and Four [13] on the ground that such prosecution was violative of the Double Jeopardy Clause. Chief Judge Mishler, in a written Memorandum of Decision and Order, denied the motion in all respects (A-42-47). The court held *inter alia*, that:

> "The Court's ruling striking the testimony [relating to the 'Kondo' AR-180 at the first trial] was an evidentiary ruling only, and did not determine the guilt or innocence of Young with respect to the crimes charged; therefore, the ruling does not bar prosecution for importing and receiving the subject weapon as charged in Counts Three and Four of the superseding indictment (A-44-45).
>
> • • • • •
>
> The not guilty verdict on the conspiracy count does not bar prosecution of the substantive counts charged in the superseding indictment [citations]." (A-46).

B. The Government's Case

Special Agent Patrick McCool testified that on October 4, 1975, as part of his official duties with the United States Secret Service, he and other agents executed a search warrant at apartment 4-B, 925 Union Street, Brooklyn, New York and that during the course of the search of the apartment certain firearms were found and seized (T. (II) 93-94). Confiscated were an AR-7, semi-automatic rifle, serial number 89474 (T. (II) 98); an Armalite, AR-180, .223 caliber, semi-automatic rifle, serial number S-12585 (T. (II) 100); and another

---

[13] These Counts related, respectively, to the transportation and receipt of the Armalite, AR-180 bearing serial number S-12590, the so called "Kondo" weapon, evidence relating to which was stricken from the record of the first trial (T.(I) 489-505).

Armalite, .223 caliber, semi-automatic rifle, serial number S-12590 (T. (II) 101).

Carl Copeland, Jr., a salesman at Cole's Sporting Goods store in Inglewood, California, testified that on July 29, 1975, he had sold an Armalite, AR-180 semi-automatic rifle, serial number S-12585 to a woman of Oriental descent whom he identified as appellant Young (T. (II) 103-106). Incident to the sale, Mr. Copeland prepared, and appellant Young signed, a Firearms Transaction Record on which she identified herself and represented that, on that day, she lived at "1555 Sixth Avenue, Los Angeles, California, 90019" (T. (II) 108-111). The document referred, by serial number, to one of the AR-180, semi-automatic rifles found in appellants' apartment on October 4, 1975.

Mr. Copeland further identified another Firearms Transaction Record, which had been prepared by a co-worker of his at Cole's and which indicated that on August 12, 1975, a second Armalite, AR-180 semi-automatic rifle, serial number S-12590, was sold to one Marc Choyei Kondo. This weapon was also identified, by serial number, as having been found and seized in appellants' apartment on October 4, 1975 (T. (II) 118-122). Special Agent Robert Finan of the Secret Service, who also participated in the search on October 4, 1975, testified that he had found an address book in which the following entry was listed: "Mark Kon[illegible] 4547 Pickford, L.A., 90019," with the telephone number "732-4592" (T. (II) 187; 194).

Thereafter, according to Martin Benedicto, the owner of a gun repair business located in Washingtonville,

New York, on August 30, 1975 he met appellants Chin and Young when they came to his shop, stating that they had a .30 caliber carbine to be repaired. On September 6, 1975 appellants Chin and Young delivered a ".30 calibre [sic] carbine, U.S. type, and serial number, 5487136" to Mr. Benedicto, which he described as "an original military U.S. carbine" (T. (II) 246-253). When appellant Young left the gun in the shop, Benedicto prepared a receipt on which one of the appellant's filled in Chin's name (T. (II) 252). On cross-examination, Mr. Benedicto testified that appellant Young had told him she was interested in guns for hunting small game such as rabbits and squirrel. At this point, the jury was given the following instruction:

> "I have permitted the defendant to cross-examine on the full conversation but the reason for bringing a firearm into the State of New York by a resident of the State of New York has nothing whatever to do with the section.
>
> The section says—and this was a Congressional plan for strictly supervising and controlling the distribution and sale and transportation of firearms in this country—Congress said, a resident of the State of New York shall not transport certain firearms into the State of New York from outside the State of New York; that a resident of the State of New York shall not receive certain firearms that were transported into the State of New York from outside the State of New York and the reason for doing it has nothing to do with the charge in this case.
>
> However, I will allow it because the defendant wants the full conversation to come in." (T. (II) 289-290).

It was established that Apartment 4-B, 925 Union Street, had been leased to Kenneth R. Chin and Elizabeth Young on July 3, 1974 (T. (II) 313-314). The lease was signed by appellants Chin and Young as joint tenants, who had rented that apartment continuously to the date of trial (T. (II) 315-320). Also admitted into evidence was a portion of a letter sent by appellant Young to the rental agent.[14] At no time during the entire tenure of appellants' tenancy, did either of them communicate to the landlord a desire to be stricken from the lease or removed as a tenant (T. (II) 323). Consolidated Edison Company records established that, from August 1, 1974 through the date of trial, all the utility bills for Apartment 4-B were sent to appellant Young. and that they had been paid (T. (II) 343-347). Nowhere in the company's records was there any indication that appellant Young had asked to be relieved of her obligation to pay the Con Edison bills (T. (II) 348-349; 351). Also introduced were New York Telephone Company (T. (II) 393) and Brooklyn Union Gas Company records which estabilshed that, beginning in August, 1974, billing for both telephone and gas service was begun for appellants' apartment in appellant Young's name and that the services continued, in this way, without any interruption, throughout 1975 (T. (II) 399; 404-405) and up to June, 1976. Finally, a certified and exemplified copy of a passport application

---

[14] Inasmuch as appellant Young has raised the issue of her state of mind during the year 1975 as it related to her "residence" or domicile, the exact text of the letter is noteworthy. It is dated December 31, 1974 and, reads as follows:

> "Dean J & J Associates:
>
> Enclosed is a money order for January 1975! [sic] rent in the amount of $195. *We look forward to a continued good relationship in the New Year*
>
> 925 Union Street, 4-B
> Elizabeth Young"

(Emphasis added) (T.(II) 322).

filed by appellant Young on August 14, 1975, in which she swore that her permanent address was 925 Union Street, Brooklyn, New York, was admitted. (T. (II) 241-242; 244). Moreover, two change of address cards which had been filed with the Postal Service by both Young and Chin were placed into evidence (T. (II) 198). These cards represented instructions given by appellants to the Postal Service that, as of June 11, 1974, their permanent address would no longer be 1555 Sixth Avenue, Los Angeles, but rather, would be "care of Chin, 3306 92nd Street, No. 46, Jackson Heights, New York Zip Code 11372" (T. (II) 201; 203). A letter carrier assigned to the United States Post Office located in Jackson Heights, New York, identified two other change of address cards (T. (II) 211). These cards represented instructions by the appellants to the Postal Service that, after August 30, 1974, their permanent address would be apartment 4-B, 925 Union Street, Brooklyn, New York (T. (II) 213-214; 221). Additionally, a clerk in the Van Brunt Post Office in Brooklyn, which includes 925 Union Street, testified that he had searched the records of his station and could find no changes of address which had been filed by or for either appellant pertaining to 925 Union Street, at any time in 1975, or even up to the time of trial in 1976 (T. (II) 226-227).

It was stipulated that the four rifles were "firearms" as that term is used in § 922(a)(3) (T. (II) 365). Thereafter, records of the New York City Firearms Control Board were introduced to establish that on July 15, 1975, appellant Chin registered the AR-7 (Government Exhibit 3) with the Firearms Control Board, and that on August 25, 1975, he also registered the M-1 (Government Exhibit 13) (T. (II) 372). Both weapons had been purchased from Michael Yanagita on July 6, 1975 and August 21, 1975, respectively, while appellant Chin was a New York resident (T. (II) 374). Also in evidence is an

affidavit of appellant Young filed with the Board on January 7, 1975, in which, *inter alia*, she swore that she resided at the Union Street address (T. (II) 374-375). Additional records of the Board established that as late as July 1, 1975 appellant Young swore she was a resident of New York (T. (II) 423-425). These records also established that, just before she travelled to California and purchased the four firearms in question, she possessed no guns in the City of New York (T. (II) 425-426). Furthermore, during July and August, 1975, when she was physically in California, she took no steps to cancel consideration of her application for a gun permit which was then pending in New York (T. (II) 427).

A certification from the Bureau of Alcohol, Tobacco and Firearms was admitted into evidence. This certification provided that neither appellant Chin nor Young had ever filed any application for firearms licenses with the United States Department of Treasury (T. (II) 237-238a).

C. The Defense Case

1. Appellant Chin's Case

Philip D. Walls, who testified that he had known both Young and Chin for a period of time, recalled that in late July or early August, 1975, appellant Chin and his parents visited with him at his home in Washingtonville, New York and that at that time Young was not with them (T. (II) 444-446). Work records were also introduced to show that between July 1, 1975 and October 4, 1975 appellant Chin was regularly employed in New York City (T. (II) 465-476).

2. Appellant Young's Case

Appellant Young's father, Charles H. Young, testified that he and his wife resided in Hanford, California and

that their daughter had been raised and schooled in California (T. (II) 495). He recalled that after she went to live in New York, (after graduating from college in 1973), she returned with appellant Chin and that they both lived, for a short while, in Los Angeles but thereafter again left California and moved to New York in 1974 (T. (II) 496-497).

Mr. Young recalled that, sometime in July, 1975, his daughter had arrived in California without appellant Chin (T. (II) 497). When asked to describe conversations he had with her when she arrived, the witness was only permitted to state that she told him that she was returning to make California her home and that she was leaving New York (T. (II) 502-503).[15] In response to a leading question, he agreed that she had specifically told him that "she was giving up her New York residence and coming to California to live there" (T. (II) 503). Mr. Young stated that his daughter had stayed with him for only a week or ten days before she went to Los Angeles and that she only stayed there for "about a month" (T. (II) 503). In mid-August, not more than three or four weeks after she had arrived in California, Young notified her father that she had returned to New York (T. (II) 503). He also added that she occasionally received some mail at his house in California (T. (II) 504). On cross-examination, her father stated that his daughter was one of eight children, none of whom lived at home (T. (II) 505). He acknowledged that any mail that he received addressed to appellant was forwarded to her at the 925 Union Street, Brooklyn, New York address (T. (II) 511-512). He also admitted that when appellant had visited him in July, 1975, she brought only a minimal

---

[15] Chief Judge Mishler would not permit appellant to elicit the "reason" for the claimed change of domicile, ruling that only the intention was relevant, not the reason behind it (T.(II) 498-502).

amount of luggage (T. (II) 515, 523). Moreover, he knew of no steps which were taken to arrange for the shipment of any other property to California or to change her address with the Postal Service (T. (II) 521-523).

Finally, Thelma Wanazi, a friend of Young's, testified to a conversation that she had had with Young in the first or second week of July, 1975 in which appellant Young stated that "she was leaving New York and returning to California and that she was planning to spend some time with her parents for a while and start a new life again" (T. (II) 529). Approximately a month and a half later she knew, however, that appellant had returned to New York (T. (II) 531).

ARGUMENT

POINT I

The Search Warrant Was Properly Issued: The Supporting Affidavit Set Forth Probable Cause To Believe That The Firearm Was Located At The Union Street Apartment.

Appellants Chin and Young contend that the affidavit which was executed in support of the search warrant was insufficient in that it did not set forth probable cause to permit the United States Magistrate to conclude that the object of the search, the AR-180 semi-automatic rifle, was located in their apartment. The argument is that the information which alleged that the rifle had been purchased by Young on July 29, 1975 in California, while she was residing at the Union Street apartment, where she was still residing on October 3, 1975, the date of the application for the search warrant, was insufficient to support an inference that the rifle was then, if ever, located at the apartment. Additional mis-

cellaneous attacks on a Supplemental Affidavit, filed in support of the search warrant, have also been raised.

It is the Government's position that the affidavit of Agent Findley set forth probable cause to believe that the subject weapon, an AR-180, semi-automatic rifle, was located in the Union Street apartment. We contend that under the circumstances, the information was not, as urged by appellants, too stale. Moreover, we further contend that the information properly gave rise to an inference that the rifle was in the apartment. Accordingly, since this affidavit was in and of itself sufficient, there is no need to consider the alleged issues relating to the Supplemental Affidavit.[16]

(1)

The main attack on the search warrant centers on the claimed staleness of the information which was presented on October 3, 1975 to the Magistrate; information then 66 days old. We submit that the age of the information, in and of itself, under the circumstances

---

[16] As set forth above, pp. 3-5, *supra*, at the time of the application for the search warrant before the U.S. Magistrate two affidavits were filed by Special Agent Neal Findley, U.S. Secret Service. The second affidavit, entitled "Supplemental Affidavit" (sealed at the time and subsequently substantially unsealed) referred to a threat against Emperor Hirohito of Japan, who was scheduled to visit New York City. However, in sustaining the validity of the Search Warrant, Chief Judge Mishler quite clearly only relied on the first (and completely) unsealed affidavit of Agent Findley. In his opinion, Chief Judge Miishler omitted reference to paragraph 5 of the first affidavit which had incorporated, by reference, the Supplemental Affidavit. (The First Affidavit, absent paragraph 5, has been set forth above p. 4, f.n. 7, *supra*).

We submit, therefore, that the Supplemental Affidavit is irrelevant, for purposes of this appeal, to determining whether there was probable cause to support the search warrant.

here does not preclude this Court from sustaining the finding of probable cause by the Magistrate, as affirmed by the holding of the district court.[17]

The governing principle is, of course, that there be a sufficient basis to justify the Magistrate in finding that probable cause existed at the time that the warrant was issued. *Sgro* v. *United States*, 287 U.S. 206, 210 (1932); 3 Wright, Federal Practice & Procedure, § 662, p. 23. However, the mere lapse of time does not automatically preclude a finding of probable cause. Or, as the First Circuit put it in *United States* v. *Dauphinee*, 538 F.2d 1, 5 (1st Cir., 1976): "[N]o hard and fast rule can be formulated as to what constitutes excessive remoteness, because each case must be judged in its circumstantial context.". See, also, *United States* v. *Rosenbarger*, 536 F.2d 715, 719 (6th Cir., 1976); *United States* v. *Kirk*, 534 F.2d 1262, 1274 (8th Cir., 1976).

In *United States* v. *Steeves*, 525 F.2d 33 (8th Cir. 1975), the Eighth Circuit was concerned with this "stale-

---

[17] In this regard, we continue to believe, as we argued in *United States* v. *Karathonos*, 531 F.2d 26 (2d Cir.), *cert. denied*, — U.S. —, 96 S.Ct. 3221 (1976) that the exclusionary rule should not be applied even if the affidavit should be held insufficient. As we contended in *Karathonos*, once a search warrant has been issued, in good faith, by a neutral and detached magistrate, and there is a defect in judgment resulting from an error in judgment on the part of the magistrate, the application of the exclusionary rule serves no deterrent function with respect to the conduct of law enforcement offifficers and should be eschewed. See *Stone* v. *Powell*, — U.S. —, 96 S.Ct. 3037, 3054-3055, 3072 (1976) (concurring opn. of Chief Justice Burger and dissenting opn. of Justice White.) See also, *United States* v. *Giacalone*, 541 F.2d 507, 516 (6th Cir., 1976) ("the magistrates" 'determination is conclusive unless his judgment is arbitrarily exercised'); *United States* v. *Sevier*, 539 F.2d 599, 603 (6th Cir. 1976) ("the determination of a magistrate is conclusive and should not be set aside when it is arbitrary").

ness" question. A warrant was challenged on the ground that it had been issued on the basis of information 87 days old. Recognizing that "lapse of time involved [in seeking and obtaining a warrant] is an important consideration and may be controlling", the *Steeves* case concluded that "it is not necessarily so" (Id. at p. 38). The Court noted that:

> There are other factors to be considered, including the nature of the criminal activity involved, and the kind of property for which authority to search is sought. Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or which is innocuous in itself or not particularly incriminating. (*Ibid*).

The *Steeves* case then applied this test to the particular facts before it and upheld the warrant which had been issued to search the defendant's home for a revolver and other evidence of a bank robbery which had taken place 87 days earlier. Moreover, the affidavit, which had been filed in support of the *Steeves* warrant, lacked any direct evidence that the items to be searched for were in the defendant's home. In essence, it had been alleged that Steeves was believed (for the reasons stated) to have been the person who had robbed the bank.[18] Upholding the validity of the warrant, the Court stated:

> Let it be assumed for purposes of discussion that the defendant in fact robbed the bank on June 22 and that he immediately repaired to his home with his loot and its container, his weapon and his disguise. We think that it may be conceded to the defendant that as late as September

---

[18] A copy of this Search Warrant and Affidavit is set forth in the Government's Supplemental Appendix (Govt. App., A. 10-A. 12).

> 17 there was little reason to believe that any of the bank's money or the money bag would still be in the home. But, the same concession cannot be made with respect to the revolver, the ski mask, and the clothing. The ski mask and the clothes were not incriminating in themselves, and apart from his prior felony record possession of the pistol was not unlawful in itself or particularly incriminating. Moreover, people who own pistols generally keep them at home or on their persons. (*Ibid.*)

This holding in the *Steeves* case is particularly apposite here, because there was no evidence to suggest that the AR-180, semi-automatic rifle involved was used in the commission of a crime, a fact which would certainly have increased the likelihood that appellant Young would have disposed of the weapon.

The question of timeliness of information presented in support of a search warrant for several firearms was squarely raised in *United States* v. *Rahn*, 511 F.2d 290, 293 (10th Cir., 1975), *cert. denied*, 423 U.S. 825 (1976), where the affidavit was based on information over two years old. In *Rahn*, a warrant was issued in July 1973; the affidavit recited that a co-defendant on the day before the warrant issued stated two years earlier, in 1971, that he had had a conversation concerning firearms with the defendant, a Special Investigator of the Alcohol, Tobacco and Firearms Bureau, who said "the weapons were too nice to destroy . . . and would be worth more money if kept for several years" (*Id.* at p. 292). There was no direct evidence that the weapons were located at defendant's home. In disposing of the claim that the information was too untimely to support a finding of probable cause, the Court held:

> "[P]robable cause is not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance" (*Ibid*).

The Court, then, went on to hold that under the circumstances the Magistrate had probable cause to believe that the defendant "still possessed the weapons in spite of the lapse of time between the facts relied upon and the warrant's issuance." (*Id.* at p. 293).

So too here. Appellant Young paid $270 for a rifle, which she purchased using her own name in California, misrepresenting, however, her address. This certainly permits the inference that the gun had been purchased for her own personal use—one of factors considered in *Rahn.* (*Id.* at p. 292). Moreover, as in the *Steeves* case, *supra,* there was reason to suppose that Young still had the rifle in her home. Once having expended $270 for a rifle, we contend that it is certainly probable that she will be in possession of that weapon only 66 days later. It is probable that a rifle is likely to remain in one's possession as a "continuing article". *Bastida* v. *Henderson,* 487 F.2d 860, 864 (5th Cir., 1973). It is the nature of a rifle, as a durable article, not subject to consumption as alcohol or drugs, that makes entirely reasonable the inference that Young still possessed the rifle, an expensive item of personal property, 66 days after purchase.

The cases cited by appellant do not mandate a contrary result. *Sgro* v. *United States, supra,* is not a holding that 21 days was too long, but rather that, under the peculiar statute, i.e., The Natural Prohibition Act, the first warrant itself became void within 10 days after issuance and a new warrant must be sought. Depending on the circumstances, the original proof may or may not be still sufficient. *Durham* v. *United States,* 403 F.2d 190 (9th Cir., 1968), concerned a search for counterfeit $20 Federal reserve notes, property which is usually, as drugs and liquor, quickly consumed or disposed of. It is the consumable nature of liquor that explains *Siden* v. *United States,* 9 F.2d 241 (8th Cir. 1925); *Dandrea* v. *United States,* 7 F.2d 861 (8th Cir., 1925) and *United*

States v. *Nichols*, 89 F. Supp. 953 (W.D. Ark., 1950). In *United States* v. *Van Ert*, 350 F. Supp. 1339 (E.D. Wis., 1972), the moveable nature of the property and especially the highly incriminatory nature of the sought-after $25,000 in cash, monies which had been stolen, precluded a reasonable belief that the property was still on the premises. Finally, *United States* v. *Boyd*, 422 F.2d 791 (6th Cir., 1970) simply follows the general rule that an affidavit must set forth when the observation in support of the warrant was made.

(2)

Appellants also contend that the affidavit lacks any evidence to establish that the AR-180 semi-automatic rifle which Young purchased in California "was located in the Union Street, Brooklyn apartment" (App. Young's Br., p. 15). To support this argument she, inexplicably, cites to cases dealing with the sufficiency and reliability of informant information. *Ibid* at p. 16. These cases, we contend, are not in point. The Government does not contend that there was any direct information that the firearm was, in fact, in the Brooklyn apartment. Rather, it is our position that the circumstances were such as to give the Magistrate probable cause to believe that the described firearm would be found as a result of a search of her Union Street apartment.

The issue, we contend, is not whether there was direct evidence to believe that the weapon was located at her apartment, but as the district court held, whether there existed a "probability that it was there . . . . *United States* v. *Mulligan*, 488 F.2d 732, 736 (9th Cir. 1973), *cert. denied*, 417 U.S. 930, 94 S. Ct. 2640 (1974); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970)" (A-40). Indeed, "the magistrate need not be *convinced* that goods are in a particular place, but rather, all that is required is that he have a 'substantial' basis

for concluding that specified property is probably where the warrant says it is" *United States* v. *Archer*, 355 F. Supp. 981 (S.D.N.Y. 1972) (citations omitted; emphasis in original). And, it is a fair inference, we submit, that the regular storage place of the rifle purchased in California by Young, would be her Brooklyn apartment, particularly since she lived there herself. *Cf. United States* v. *Samson*, 533 F.2d 721, 723 (1st Cir., 1976).

In *United States* v. *Rahn, supra*, the Court of Appeals quoting approvingly from the language of the district court observed:

> As Chief Judge Arraj stated, in denying the original motion to suppress: "It is reasonable to assume that his house was where he kept things and *it is pretty normal I believe for individuals to keep weapons in their homes, particularly hunting weapons and weapons which may be kept for the safety of the family.*" Here an ATF agent was believed to possess the weapons; certainly, he would not have had the weapons at his office. Admittedly there are other places where the guns might have been stored; yet, we believe these facts and circumstances gave the magistrate probable cause to believe the weapons would be found as a result of the search of appellant's present residence." (*Id.* at pp. 293-94; emphasis added).

Although not involving weapons, other cases have upheld warrants for searches of homes, even though there had been no direct evidence that the items sought were actually seen on the premises. So, for example, in *United States* v. *Lucarz, supra*, the defendant, a postal employee, signed a receipt for the previous day's sale of stamps. Later that day he reported that the pouch had been cut and the contents missing. The stolen monies

were recovered during the execution of a search warrant at the defendant's home five days later, although the affidavit in support of the warrant showed that the defendant was not seen taking the mail to his home, nor did anyone observe the stolen monies there. The Ninth Circuit in upholding the warrant stated:

> "The situation here does not differ markedly from other cases wherein this court and others, albeit usually without discussion, have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." (*Id.* at p. 1055).

In sum, we contend that under the circumstances it was reasonable to assume that the AR-180, semi-automatic rifle purchased by Young in California for $270 was probably kept by her in her apartment. See also *United States* v. *Steeves*, *supra*, at p. 38.

(3)

Next, appellant contends that the affidavit failed to establish that a crime had occurred. To support this argument she relies upon *United States* v. *Mendoza*, 487 F.2d 309 (5th Cir. 1973), which dealt with the issue of whether the evidence therein was sufficient tosustain a conviction. The issue here is totally different; it is whether there was probable cause to believe that when Young purchased the AR-180 semi-automatic rifle, she knowingly gave a false address. If so, the Magistrate was justified in believing that there was probable cause to establish a violation of 18 USC § 922(a)(6). A

reading of the affidavit makes it clear that there was adequate cause to believe that such a violation had occurred.

(4)

Finally, appellant contends that the Supplemental Affidavit contained material misstatements of fact which render the warrant invalid. First, as set forth in the Affidavit of Agent Findly, submitted in reply to the same claim in the district court, the erroneous statement that Young resided with Ms. Miyomoto in 1973, when she actually lived in adjoining houses was an honest mistake. (Govt. App. A. 17). Moreover, the alleged threat against Emperor Hirohito was one that could not be ignored. 18 U.S.C. § 3056. As the reply affidavit sets forth, the Secret Service was dealing with a threat that, under the circumstances, would have justified issuance of the warrant even if there was lacking probable cause. *People v. Sirhan*, 494 P. 2d 1121, 1140 (Sup. Ct. Cal., *en banc*, 1972), *cert. denied*, 410 U.S. 947).[19]

But these issues need not be reached. The district court found that the first affidavit was sufficient. Therefore, it did not have to evaluate the Supplemental Affidavit. And, in any event, it was held that "[T]he alleged misstatements in the supplemental affidavit are therefore inconsequential. *United States* v. *Gonzalez*, 488 F.2d 833, 838 (2d Cir., 1973)" (A-31). See, also, *United States* v. *La Vecchia*, 513 F.2d 1210, 1217-18 (2d Cir. 1975).

---

[19] The California Supreme Court in *People* v. *Sirhan*, *supra* at p. 1140, stated: "Although the officers did not have reasonable cause to believe that the home contained evidence of a conspiracy to assassinate political leaders, we believe that the mere possibility that there might be such evidence in the house fully warranted the officers action."

POINT II

Neither The Doctrine Of Collateral Estoppel Nor Double Jeopardy Barred Prosecution Of Appellant Young On The Superseding Indictment.

Appellant Young [20] contends that the earlier acquittal on the conspiracy count in the original indictment (Count 1) and inability to reach a verdict on the substantive transportation count (Count 2), bars any further prosecution of her on the substantive transportation offenses alleged in the superseding indictment. She contends that this result is required under either the Double Jeopardy Clause or on a theory of collateral estoppel. Essentially, it is her argument that the verdict of acquittal on the conspiracy was a finding that she had not purchased an Armalite AR-180 semi-automatic rifle, serial number S-12585 in California (overt act No. 1), that she, together with Chin, had not possessed the three firearms at her Brooklyn apartment (overt act No. 2), that there was no illegal agreement between herself and Chin; and that she had changed her residence to California. (App. Young's Brief, p. 30). We disagree. It is the Government's contention that these issues were not necessarily determined by the acquittal on the conspiracy count. Moreover, we contend that the failure of the first jury to reach a verdict on Count 2, the substantive transportation count, permitted a retrial on the substantive transportation counts as realleged in the superseding indictment.[21]

---

[20] Appellant Chin, correctly, does not join in this point inasmuch as it has no application to him (Brief of Appellant Chin, P. 31).

[21] Count 2 of the original indictment charged that between August 15, 1975 to October 4, 1975, Chin and Young, violated 18 U.S.C. § 922(a)(3) and 2 by knowingly transporting, from California to Brooklyn, New York, four firearms, i.e., an M-1 carbine.

[Footnote continued on following page]

The rule, originally set forth in *United States* v. *Perez*, 22 U.S. (9 Wheat) 59 (1824) is, of course, well-settled: A retrial is permitted following the declaration of a mistrial due to the inability of a jury to agree upon a verdict. See also, *Illinois* v. *Somerville*, 410 U.S. 458, 461 (1972); *United States* v. *Goldstein*, 479 F.2d 1061 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973). That application of this rule that would, if the substantive count had been charged in a single-count indictment, have permitted retrial is beyond challenge. Thus, the initial question is to determine the effect of the joinder of the conspiracy count in the same indictment and the jury's acquittal on that count.

An almost identical situation occurred in *United States* v. *McGowan*, 385 F. Supp. 956 (D.N.J., 1974). In *McGowan*, there had been a prosecution under an indictment charging defendant McGowan with conspiracy to import a quantity of marijuana into the United States and with a separate conspiracy to distribute the same marijuana and to possess it with the intent to distribute. The indictment also charged McGowan with two substantive offenses; having knowingly concealed and facilitated the transportation of marijuana, knowing it had been illegally imported and possession of marijuana with intent

---

Serial Number 5487136; an Armalite AR-7 rifle, Serial Number 89474; an Armalite AR-180 rifle, Serial Number S-12585; and an Armalite AR-180 rifle, Serial Number S-12590, which firearms, it was alleged, had been purchased by them in California while they were residing in Brooklyn, New York.

The superseding indictment charged, in eight counts, the separate transportation and receipt of each of these four firearms. However, as to appellant Young, Chief Judge Mishler only permitted the transportation counts to go to the jury. Therefore, we submit that she was retried on what was, in effect, the substantive charge upon which the first jury was unable to reach a verdict. Moreover, since she was ultimately convicted of only one transportation count (Count 1) she is in the same position as if she had been retried on the original substantive count.

to distribute it. At the first trial, McGowan was acquitted of all but the count charging him with conspiracy to import marijuana. On this count, the jury was unable to reach a verdict and a mistrial was declared. Thereafter, McGowan sought to bar a retrial on grounds of double jeopardy and collateral estoppel.

The court in *McGowan* framed the issue to be decided as follows: "[W]hether [a] defendant, who has been properly tried on a multi-count indictment, may be retried on the count on which the jury failed to agree" (*Id.* at p. 958). It was decided that a defendant may be so retried. This result was reached after considering the application of both double jeopardy and the doctrine of collateral estoppel. Moreover, and perhaps most important to the instant appeal, the court rejected an argument that "since a retrial on count 1 must follow an earlier acquittal on count 2, the case is indistinguishable from one in which defendant was indicted, tried, and acquitted of conspiring to distribute marijuana and later reindicted and retried for conspiring to import it." (*Ibid*). According to the court, "If defendant's reasoning were correct, it would follow that if the conspiracy offenses charged in counts 1 and 2 were the same offense under the 'same evidence' test, then a retrial on count 1 would place defendant twice in jeopardy." (*Ibid.*) This "syllogism that because two offenses must be joined for trial an acquittal of one must constitute, in effect, an acquittal of the other", was rejected (*Id.* at p. 959).

Finally, in *McGowan*, the collateral estoppel argument was also rejected. The court determined that since the Supreme Court in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) required that collateral estoppel be applied with "realism and rationality", it would not ignore the jury's inconsistency; an inconsistency permitted in jury verdicts. E.g., *Hamling* v. *United States*, 418 U.S. 87,

101 (1974); *Dunn* v. *United States*, 284 U.S. 390, 393 (1932). The court held:

> "Since the nature of the jury's deliberations is not known, it cannot be determined whether the error or inconsistency prejudiced defendant or the government. Either proposition is equally plausible. But the government cannot, see, *Kepner* v. *United States*, 195 U.S. 100, 24 S. Ct. 797, 49 L. Ed. 114 (1904), and does not attempt to, deprive defendant of the benefit of the acquittal on count 2. In fairness, he ought not be permitted to rest on that verdict to collaterally estop a retrial on count 1. See *United States* v. *Maybury*, 274 F.2d 899, 905 (2d Cir. 1960).
>
> Since the jury's inconsistency must be considered, the Court cannot conclude that defendant's acquittal "necessary determined" that he never joined the conspiracy alleged by the government. Defendant's other grounds for dismissal having been already rejected, his motion to dismiss count 1 must be denied." (*Id.* at p. 961).

Moreover, in *Forsberg* v. *United States*, 351 F.2d 242 (9th Cir. 1965), *cert. denied*, 383 U.S. 950 (1966), a case involving a multi-count indictment in which there had been an acquittal on the greater offense (assault with intent to commit murder) and a hung jury on the lesser offense (assault with a dangerous weapon with intent to do bodily harm), retrial of the lesser offense was permitted. The Court, noting that "both counts were properly included in the original indictment," stated:

> "Let us assume that appellant had been found not guilty on Count One and guilty on Count Two, and that his conviction on Count Two had been reversed with a remand for a new trial. We perceive no good reason why he could not have been

> retried on Count Two. Nor should the fact that there was a hung jury instead of a verdict of conviction bar his retrial on Count Two. Obviously, he could not in either event be retried on the charge set forth in Count One." (351 F.2d at p. 248).

See also, *United States* v. *Scott*, 464 F.2d 832 (D.C. Cir. 1972), which permitted a retrial where the first jury acquitted the defendant of counts charging armed robbery and assault with a deadly weapon but was unable to reach a verdict on a third count in the indictment charging him with robbery. The Court in *Scott* stated that it was following the *Forsberg* decision of the Ninth Circuit which it held was "correctly decided". 484 F.2d *supra*, at p. 834.

Although, according to our research this Court has not decided this precise issue, we urge that the reasoning of the *Forsberg*, *Scott* and *McGowan* cases be followed.

Turning to the collateral estoppel argument pressed on this appeal, we submit that appellant Young has failed to establish that the first jury, in acquitting on the conspiracy count, *necessarily* resolved, in her favor, all the issues raised at the retrial. The failure to do so is fatal to her claim. E.g., *United States* v. *Guillette*, Dkt. No. 76-1041, slip op. 6099, 6120 (2d Cir., December 20, 1976); *United States* v. *Jacobson*, Dkt. No. 76-1345, slip op. 1021, 1024 (2d Cir., December 17, 1976).

First, it is most likely that the jury must have found Young innocent of the conspiracy count because they were not convinced that the requisite agreement had been proven. The acquittal could not, as appellant contends have meant that the jury found that Young was no longer a resident of California inasmuch as the district court charged that "In this case it does not matter if you find that the Government has failed to prove that the defendant Young was not a resident [of New York] at the time"

(T. (II) 564). As explained in the district court's Memorandum of Decision in which Young's motion to dismiss the superseding indictment was denied: "Proof that defendant was a resident of the State of New York at the time of the importation is an essential element of the substantive offense; for the conspiracy count, the government's burden on proof of residency was only to prove that the conspiracy *contemplated* that one of the conspirators be a resident of New York at the time of importation" (A. 46; emphasis added). This correct statement of law is unchallenged on this appeal. Hence, it is dispositive of further collateral estoppel argument.[22] Therefore, the subsequent prosecution for the substantive crimes committed was proper. Indeed, this Court recently held that "[s]eparate indictments on substantive counts are always available without double jeopardy problems." *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974).

Finally, we contend that appellant Young's reliance on *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961) and *Sealfon* v. *United States*, 332 U.S. 575 (1948) is misplaced. In the latter case, the Supreme Court held that Sealfon, who had been tried and acquitted on a single charge of conspiracy could not be reindicted for a charge, arising out of the same facts, the crux of which was an alleged agreement necessarily determined in the first trial to be nonexistent. In this case, as has been seen, the jury's

---

[22] Since this issue has not been *necessarily* decided in Young's favor, her claim must fail. Moreover, the jury's verdict, likewise did not necessarily determine that the acts alleged as Overt Acts No. 1 (purchase of a firearm, serial number S-12585 by Young in California) and No. 2 (possession of four firearms, serial numbers 5487136, 89474, S-12585 and S-12590 by Chin and Young at 925 Union Street, Brooklyn, New York) did not occur. Indeed, as stated above, and especially in view of the fact that Chin was in the courtroom throughout the trial not as a defendant, but as an observer, (T. (I) 300) the jury simply may not have found proof, beyond a reasonable doubt, of an agreement.

verdict was not similarly explainable. In the other case upon which she relies, *United States* v. *Kramer*, this Court held that a prior acquittal of all eight substantive counts arising from the same two post office burglaries precluded a subsequent prosecution for conspiracy and other substantive counts relating to the same burglaries. In *Kramer*, however, there was no "mystery as to what was determined by the verdict of not guilty", a verdict that was rendered on all counts. Here, the jury's action was not, as in *Kramer*, "devoid of alternative possibilities". See also, *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir., 1973).

Accordingly, it is contended, for the reasons set forth above, that Chief Judge Mishler was correct in denying the motion to dismiss the superseding indictment on double jeopardy or collateral estoppel grounds.

POINT III

The instructions of the District Court were correct.

It is contended that the district court erroneously instructed the jury in several respects, and that these errors warrant reversal of the convictions. Both appellants urge that the district court's definition of the term "resides," as used in 18 U.S.C. § 922(a)(3) was incorrect. Related to this is a claim that the court improperly excluded certain testimony which, allegedly, concerned Young's state of mind and was relevant in the issue of residency. Moreover, each argues that it was error for the court to have refused to charge the Congressional purpose as set forth in the preamble to the overall legislation which included § 922(a)(3). In, this connection, it is also contended that it was error to exclude evidence which would have been pertinent to this purpose. Finally, appellant Chin claims that the court's

charge on the elements of the transportation count and on aiding and abetting was incorrect. The Government contends, as set forth below, that the instructions were entirely correct.

(1)

Initially, it is deemed appropriate to quickly dispose of the contention relating to the Congressional purpose. This claim is completely frivolous. The argument, in essence, is that the jury should have been instructed that the Congressional intent, as expressed in the Preamble to the Gun Control Act of 1968,[23] was to prevent firearms from reaching criminals; not to discourage the lawful ownership and use of firearms by law-abiding citizens. (See A-55 for the full charge requested).

The case cited by appellant, in support of this charge, *Huddleston* v. *United States*, 415 U.S. 814 (1974), does not concern instructions to the jury, but the constitutionality of 18 U.S.C. § 922(a)(6). Thus, the case is simply inapposite.

While a preamble may be resorted to for statutory interpretation under certain conditions, *Huddleston* v. *United States*, *supra*, at p. 824; 82 C.J.S. Statutes § 349; *cf.* McKinney's Statutes, § 122, the question of statutory intent is, we submit, one of law for the court and not of fact for the jury. Thus, the appellants were not precluded from advancing a theory of defense. *Cf. United States* v. *Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976). Moreover, the motive for transportation or receipt of the firearm is not a defense since there is no requirement of scienter under § 922(a)(3). *United*

---

[23] Public Law No. 90-618, Section 101.

States v. *Jones*, 481 F.2d 653, 654 (2d Cir. 1973). Accordingly, the claim is without merit.

(2)

Turning to the instruction concerning the term "State where he resides," as used in § 922(a)(3), it is contended that the district court's charge incorrectly equated domicile with residency. While the statute may not require actual domicile, it certainly requires more than mere physical residence, or in other words, a hybrid between the two. Therefore, we contend that the charge, taken in its entirety, and in light of the evidence in this case, was not inadequate and did not constitute reversible error.

The initial question is whether the term residence, as used in § 922(a)(3), means domicile. Examination of the legislative history shows that the Congress simply did not consider the issue. Nowhere is there mention of the term domicile or any discussion of the word residence. But it is clear that the Congressional purpose was to prevent the purchase and subsequent interstate transportation of guns by the "out-of-state *nonresident*" (Senate Report, 1968 Code Cong. and Admin. News, 2164; emphasis added). The statutory scheme was expressly designed to prohibit "[a]ny person other than a licensee . . . from transporting or receiving in his *State of residence* any firearm purchased or otherwise obtained by him outside *that State*" (House Report, 1968 Code Cong. & Admin. News, pp. 4418-19; emphasis added).

Consistent with this purpose and in order to "carry out the provisions of" the statute, 18 U.S.C. § 926, the Secretary of the Treasury, defined "State of residence," in pertinent part, as "[t]he State in which an individual regularly resides or maintains his home . . . . Temporary

sojourn in a State does not make the State of temporary sojourn the State of residence." 27 CFR, § 178.11. Certainly, what was contemplated was more than mere physical residence, the place where an individual stops to rest or to visit. *United States* v. *Jones*, *supra*. Indeed, the Secretary gave two examples to clearly set forth the distinction.[24] To hold otherwise, that the statute means mere physical residence, without further indicia of permanence, would completely emasculate the legislative scheme. There would be no meaning to the statute; anytime an individual purchased a gun while on a visit or during a brief stay in a state other than his residence, his stop-over in the other State would be sufficient to create residence. This result would be contrary to the expressed intent of Congress. On the other hand, to construe the statute, as the Secretary has done, would be consistent with the expressed Congressional purpose.

This conclusion, that the word residence does not mean domicile, does not, however, render the instruction reversible error. In *United States* v. *Jones*, *supra*, this Court approved an instruction that, while not so characterized, was a charge that defined "residence" under § 922(a)(3) to mean domicile. The jury was instructed

---

[24] 28 C.F.R. § 178.11 provides:

Example 1. A maintains his home in State X. He travels to State Y on a hunting, fishing, business or other type of trip. He does not become a resident of State Y by reason of such trip.

Example 2. A maintains a home in State X and a home in State Y. He resides in State X except for the summer months of the year and in State Y for the summer months of the year. During the time that he actually resides in State X he is a resident of State X, and during the time that he actually resides in State Y he is a resident of State Y.

that " 'residence' . . . is the place where [a person] dwells at the time in question and plans to dwell for the indefinite future." [25] Approving such instruction, this

---

[25] The entire charge in the *Jones* case was as follows:

"The area of dispute, as I think you know, tends to focus on the element of residence and on the question to be more specific and a little simpler whether within the meaning of this law at the time in question, when he came to New York on that bus trip, New York State was the state of this defendant's residence.

"Now, with that as the center of this short and narrowly defined case, let me say to you a few propositions about the meaning of residence as you will consider it and apply it in this case.

"First of all, to restate the issue, I think you were made aware yesterday afternoon that the crux of the dispute between the government and the defense here centers on the question whether, after he had left the service, the defendant proceeded to make Alabama and, apparently, the home of his uncle the state of his residence rather than in New York, the place where he had lived for some years before entering the military service and where he has lived for the period since he returned eventually on that bus trip.

"I am not going to repeat the evidence on that subject or any other, in fact. The evidence was brief. You heard it. You all paid attention to it and it will be your collective recollection, in any event, that will control. I have just reminded you of the general character of that evidence to formulate what appears to be the central issue of your determination.

"As to the meaning of the word "residence" or the concept of residing, as you will apply it in deciding this case, a person's residence in the legal setting that concerns you, as in your own factual use of the English language pretty much, residence refers normally for our purposes here to the place that a person calls and treats as his home. It is the place where he dwells at the time in question and plans to dwell for the indefinite future.

"It need not be, as you well know, a place where he plans to dwell or stay or make his home forever. In our

[Footnote continued on following page]

Court wrote that the charge in question, which had not been objected to, "properly framed the central issue as whether Jones had ever become a resident of Alabama." 481 F.2d *supra*, at p. 654.

Turning to the charge in this case, Chief Judge Mishler's instructions on residence, which extended over five pages, were as follows:

---

society where we are quite mobile, people with some frequency change their places of abode, the places where they live. They change their residences, but your residence, anybody's residence in this context, is the place where you or he or one dwells at a given time and intends to continue to dwell for some indefinite period into the future.

"If you live in state "A" and you give up your dwelling there and you move or you proceed to move to a new home in state "B", planning that you will dwell in that second state, state "B", from then on and to live there for the indefinite future, then state "B" becomes your residence at that point as soon as you make the move.

"On the other hand, if you live in state "A" and that is your home and the place you intend to make your home for the indefinite future and if you go on a visit to state "B", even if that is intended to be of some duration, your home remains state "A" and state "A" continues to be the state where you reside, the state of your residence in the meaning that you will apply in this case.

"If you live in state "A" and you have a plan or a hope or an expectation that at some uncertain and distant future time you will move to state "B" or some other place, then state "A" remains the state in which you reside, remains the state of your residence until that plan becomes reasonably definite and the anticipated move becomes reasonably concrete and imminent and not something in the far off and distant vague and uncertain future.

"Now, I have wrung a few changes on this conception of residence in the hope that that will help you to focus on your problem and to understand the meaning of that conception as you will apply it in this case to the resolution of what I suggest is probably the correct question for your determination of the case."

"Residence as used in the statute is defined in legal terms as domicile. That doesn't help you much—saying it's domicile but I want the record to show that I entend [sic] charging the jury that as used in this statute residence is domicile.

You cna [sic] have any number of homes. You can have a home at the beach and if you are rich enough you might have a home in Monaco and you can have a home in Florida and an apartment in New York. But, you can only have one residence, as I am defining it, for the purpose of this statute.

Residence, as used in this statute, means the place where the individual dwells, regarding it as his or her home as distinguished from the other places.

It is the place where one intends to live for an indefinite time. The individual in his or her own mind doesn't say well, I'm going to be here for three days and then I'm going to leave the place and never come back. That wouldn't be a residence.

It doesn't matter if the party lived there for 20 years. If the party at the particular moment said well, I'm leaving next week and going someplace else, that's an intention to abandon the residence and take up a new residence. It is not yet acquiring the new residence.

Domicile is usually the place where you have your personal effects, your belongings, your household goods, your valuables. It is the place where you regularly receive mail. It doesn't matter what the form of the dwelling is. It might be a hotel room that you regard as your permanent

residence; it might be an apartment, a rental apartment; it might be a cooperative apartment or a condominium; it may be a little hut and it may be a twenty room house.

In this case there is evidence in the record that the defendant Young said she was going home; that she went to the home or residence of her father and mother in Huntford or some such place in California—I don't remember—I see the foreman is ready to tell me but it doesn't matter—you see, you remember things better than I so don't count on my recollection because yours is probably better—in approximately the middle of the summer of 1975; remained there approximately ten days and then went to some address, as I recall, on 6th Street in Los Angeles and then came back to Brooklyn to 925 Union Street.

In determining the defendant Young's residence during that period of time, you must determine whether, when she left 925 Union Street, Brooklyn, she actually gave up, surrendered her home and went to California never intending to return to 925 Union Street and intending to go to California and remain there for an indefinite period of time.

The significant evidence as to whether or not the defendant gave up her residence at 925 Union Street is whether she took her belongings with her.

Evidence that an individual packed up and moved all of his or her belongings would be very strong evidence—not determinative but strong evidence—that he or she gave up his or her residence.

Of course, leaving a residence and intending to leave behind all personal effects and move out

of the state—if that is shown—then that too, is strong evidence. A party doesn't have to physically carry everything. So, you decide whether the defendant Young abandoned, gave up, surrendered her residence in Brooklyn. For before you can acquire a new residence, as in this case the evidence must show that, Miss Young, gave up her then current residence in Brooklyn and went to California intending to reside for an indefinite length of time in California, and resided in California with that intention.

Now obviously, a brief sojourn intending to return to a residence is neither abandoning nor giving up the old residence nor establishing a new one.

However, the fact question remains for you to decide and in the context of this case it is the Government that must prove residence at the time of the transportation.

So, with all the evidence of going to California, the statements made by the defendant Young—you decide whether the Government proved beyond a reasonable doubt that at the time of the transportation the defendant Young was a resident of the State of New York." (A-102-106).

While the statement that "you can only have one residence, as I am defining it, for the purpose of this statute" (T. (II) 797; A-102) was not in accord with the definition of residence set forth in Title 27, C.F.R., its inclusion was not prejudicial in this case where there was no claim that appellant simultaneously had two residences. The issue, rather, as set out in Young's Request to Charge (Request No. 14; A-56) concerned the alleged relocation from one State to another; an issue

that was covered in the court's charge. Indeed, under the circumstances in this case, that was the crucial issue—whether Young, when she was at her father's home for approximately ten days in the summer of 1975 (T. (II) 503), had transferred her residence to California—*not* whether she had or could have had two residences at the same time.[26] On this issue, the court's charge was similar to that given by Judge Frankel in the *Jones* case, *supra*, which charge was proposed by the Government here (T. (II) 562) and to which counsel for appellant Young stated: "I don't have too much objection to his proposed charge. I think it kind of follows along." Counsel, however, then excepted to the charge "on the position that it doesn't follow, it does not follow the language that we find in the official publication of the Department of the Treasury" (T. (II) 562-63).

The jury, based on the instructions given, was entitled to have found that Young, during her ten day visit to her father, had changed her residence. But, obviously, the jury rejected this claim which it was squarely asked to consider and decide.[27] When the evi-

---

[26] Young's counsel also requested a charge that "a person may have a legal residence in two states." (A-56). However, as the facts developed in this case such a charge was clearly not consistent with the evidence. Therefore, it would have been proper to have denied this charge simply on the ground that it had no evidentiary support.

[27] At one point during the charge, the court stated:

> ". . . one of the hotly disputed issues in this case is the residence of Young at the time she allegedly transported a gun into the State of New York—the Government says she was a resident of the State of New York residing at 925 Union Street in Brooklyn while the defendants say she was not at that particular time; that she had given up, abandoned her residence in New York and became a resident of California." (T. (II) 754-55; A-60-61).

dence is viewed in the light most favorable to the Government, *United States* v. *Glasser*, 315 U.S. 60, 80 (1942), the jury was clearly entitled to find that Young's residence, during the time in question, was New York. Her contention that when she visited her father for ten days, without changing any postal records, utility records, bringing any substantial luggage, etc., she had changed her residency was simply rejected by the jury.[28]

(3)

It is contended by appellant Chin that the charge on the elements of the transportation count was incorrect in that the court omitted the alleged requirement that "the person who received the weapon must be the same person who obtained the weapon" (App. Chin's Brief, pp. 21-22). It is his claim that the crime is only ap-

---

[28] Appellant Young in Point III of her Brief contends, in a related argument, that the district court improperly excluded testimony which was, so it is argued, relevant to her state of mind on the issue of residency. It is claimed that the court refused to permit her father to testify about what his daughter said when she returned to California, beyond that she had come "to California to establish her residence" (T. (II) 502-503). The implication is that relevant evidence concerning her state of mind was precluded. This is not so. The court held that her father could "testify that [his daughter] said she was coming to California (T. (II) 500) and "that she intended to live in California permanently" (T. (II) 501), but "not the reason . . . not that she had a fight with Kenneth Chin" (T. (II) 500).

Certainly, hearsay statements are admissible to show intent to establish domicile. *Cf.*, Rule 803 (3), Fed. Rules of Evidence; 4 Weinstein's Evidence, ¶ 803(3)[03]; 6 Wigmore, Evidence (3d Ed.), compare § 1727 with § 1784. However, the excluded evidence would only have provided a reason for the statement and would not have been evidence of her then existing state of mind. This mental state was established with the discretionary admission of her father's testimony that his daughter told him that she intended to return to live in California permanently. Accordingly, the ruling was correct.

plicable "to those instances in which the person obtaining and receiving [the firearm] are the same person" (*Ibid.*). We submit that this claim is totally frivolous.

Section 922(a)(3) provides: "(a) It shall be unlawful—(3) for any person . . . to transport into or receive in the State where he resides . . . any firearm purchased or otherwise obtained by such person outside that State." Clearly, the statute does not contemplate that the person charged with illegally receiving or transporting the firearm must have been the same person who physically did the act. Obviously, what the language means is that to be liable under this section, the act of transporting or obtaining must have been committed without the State of residence of the defendant, either directly by the defendant or have been caused to be committed by the defendant, 18 U.S.C. § 2(b), or have been procured by the defendant, 18 U.S.C. § 2(a). Certainly, however, there is no indication that the Congress intended to withdraw a § 922(a)(3) violation from prosecutions under 18 U.S.C. § 2.[29]

Accordingly, this wholly meritless contention should be rejected.

---

[29] Defendant Chin disingenuously suggests that this result is mandated because the purpose of the law was to regulate the mail order acquisition of firearms. (App. Chin's Brief, p. 23). This is, of course, one of the purposes of the statute. (1968 Code Cong. & Admin. News, 2164). However, the statute was also intended to regulate the "out-of-state non-resident" source of weapons (*Ibid.*). Certainly, therefore, the Congress could not have intended to have impliedly repealed 18 U.S.C. § 2, insofar as this section is concerned. *Rosencrans* v. *United States*, 165 U.S. 257 (1897). This conclusion is even more compelling when it is recognized that 18 U.S.C. § 2 is vital to this gun control legislation. Without it, a person could simply, by the simple means of not physically leaving his own State, avoid criminal prosecution for obtaining and transporting firearms from without his own State, into that State.

(4)

Finally, appellant Chin contends that the district court incorrectly charged that he could be found guilty as an aider and abettor on the transportation counts even if the jury were to find that Young, herself, was innocent because she was a resident of California at the relevant time. To support his contention, Chin quotes that portion of the charge in which the court did, indeed, state that "the mere fact that you must find the defendant Young guilty by reason of failure to prove residence does not exculpate Mr. Chin" (App. Chin's Brief, p. 30). However, Chin completely ignores the district court's instruction concerning 18 U.S.C. § 2(b) (T. (II) 789-791; A-94-96).

In instructing on the effect of § 2(b), Chief Judge Mishler, characterizing the theory as "aiding and abetting" stated, as set forth in that section, that: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal" (T. (II) 790; A-95). Since, Chin had been proven (as part of his case) to be a resident of New York at the time the firearm was transported into the State of New York, this instruction was entirely correct. *United States* v. *Rappaport*, Docket No. 76-1291, Slip. op. 423, 429-30 (2d Cir., November 4, 1976) (an intemediary need not be guilty of the crime with which the defendant is charged pursuant to Section 2(b)). Accordingly, this claim is baseless.

POINT IV

There Was Sufficient Evidence to Sustain Chin's Conviction.

Appellant Chin contends that there was insufficient evidence to sustain his conviction on either count. Essentially, he argues that there was not an adequate basis to support the finding of the jury that he had illegally received the AR-180 semi-automatic rifle after it had been transported from California. This argument is grounded in his peculiar reading of the statute which, according to him, requires that the person charged with receiving the firearm be the one who physically obtained it out-of-state.[30] He also argues that there was insufficient evidence to prove that he had aided and abetted the illegal transportation of the riflle by Young from California to New York. The Government contends that viewing the Government's evidence in the most favorable light, as it must be viewed, *Glasser* v. *United States*, *supra*, there was adequate evidence from which sufficient inferences of Chin's guilt could be drawn to sustain the jury's verdict.

(1)

Turning the first to the receiving count, the Government established that on July 29, 1975, appellant Young, with whom Chin had been living together continuously since her graduation from college in June, 1973, purchased an AR-180 semi-automatic rifle in Inglewood, California. It was further established that on October 4, 1975, this firearm was seized by federal agents, when they executed a search warrant at Apartment 4-B, 925

---

[30] As discussed in Point III (3), *supra*, pp. 43-44, we contend that this reading of the statute is incorrect.

Union Street, Brooklyn, New York. This apartment had been jointly occupied by Chin and Young since July 3, 1974. Also seized from the apartment were two other semi-automatic rifles, one of which, an AR-7, was registered on July 15, 1975 by Chin with the New York City Firearms Control Board. Another firearm, an M-1, semi-automatic rifle although not seized from the apartment, was established to have been similarly registered by Chin on August 25, 1975. It was also proved that this M-1 had been delivered for repair to a gunsmith, by both Chin and Young, on September 6, 1975 and that, the previous week they had together visited his shop to discuss the repair of the rifle. Moreover, records of the Firearm Control Board established that, on July 1, 1975, Young had possessed no guns in the City of New York.

These circumstances, we submit, allowed the jury to find that the subject AR-180 semi-automatic rifle was jointly possessed by Chin and Young and that both exercised, at the time of seizure, dominion and control over it. *United States* v. *Craven*, 478 F.2d 1329, 1333 (6th Cir.), *cert. denied*, 414 U.S. 866, *rehearing denied*, 414 U.S. 1086 (1973). The evidence that both jointly occupied the apartment since July 1974; that both had lived together, both there and elsewhere, for an extended period of time; and that both jointly indicated to the gunsmith their interest in guns and that they were "gun oriented," virtually compels the conclusion that the firearm was in their constructive joint possession.

As stated in the *Craven* case, *supra*, which involved the illegal possession of firearms:

> "Possession may be either actual or constructive and it need not be exclusive but may be joint. Actual possession exists when a tangible object is in the immediate possession or control of the party.

> Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others. Both actual possession and constructive possession may be proved by direct or circumstantial evidence. It is not necessary that such evidence remove every reasonable hypothesis except that of guilt." (*Id.* at p. 1333, citations omitted).

Since, as shown, the evidence clearly permits a finding that the rifle was constructively possessed by Chin, the further question is whether such finding, together with all the other evidence, allows the inference that he received the rifle in New York. We submit that it does. Although there was no further direct evidence, the fact that Chin possessed the rifle soon after it was imported into New York would, as the count charged, permit the inference that Chin had "received the weapon and that when he received the weapon he knew that the weapon was unlawfully transported in the State of New York" (T.(II)795; A-100).

It is submitted that even if each of the items of evidence discussed above "is susceptible of an explanation other than . . . [Chin's] participation" in the crime, those "pieces of evidence must be viewed not in isolation but in conjunction" *United States* v. *Geaney*, 417 F.2d 1116, 1121 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969). The evident purpose of Young's trip to California; the joint possession of other guns with Young; the joint statement about their interest in guns; the inference arising from their joint possession of other rifles; the inference arising from the registration by Chin of two rifles with the Firearm Control Board; and the reasonable inference to be drawn from all the above—"each of [these] episodes . . .

gained color from each of the others." *Id.* at 1121, quoting from *United States* v. *Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962). When so viewed, Chin's receipt of the firearm is amply established. Indeed, the evidence here is such that "a reasonable mind might fairly conclude guilt beyond a reasonable doubt" *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), quoting from *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). Accordingly, the verdict of the jury should not be disturbed.

(2)

Concerning the transportation count, the evidence while close is, we submit, sufficient to sustain the jury's verdict. Without reiterating the facts, set forth above, it is noteworthy to add, in connection with this count, that it was established that Young had returned to California for a brief ten day visit with her parents, and, that approximately one month later, she returned to New York after stopping to see friends in Los Angeles. It was further established that Young originally had moved to New York against the wishes of her parents. From this, it is certainly reasonable to infer that Chin, who the evidence established had jointly possessed firearms with Young, knowingly aided and abetted her purchase of the weapon in California during her unaccompanied visit to her parents and that she was to bring it back with her when she returned to New York. Indeed, from the fact that he had received and possessed the rifle, the conclusion follows that Chin had participated in its transportation from the place of purchase to New York. *Cf. McAbee* v. *United States*, 434 F.2d 361 (9th Cir. 1970).

Accordingly, the conviction of appellant Chin on the transportation count should, likewise, not be disturbed.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
January 26, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
Assistant United States Attorney,
Of Counsel.

★ U. S. Government Printing Office 1976— 714-018-AENY-043

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

BJF:ec
F.#763,333

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

January 31, 1977

Hon. A. Daniel Fusaro
Clerk
United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

Re: United States v. Chin and Young
Court of Appeals No. 76-1420

Dear Mr. Fusaro:

I am writing to advise you of a typographical error which appears in the Government's brief in the above-captioned case filed on January 26, 1977.

The error appears in footnote 17, page 19, last line. The line should read, "unless it is arbitrary," not "when it is arbitrary."

We would appreciate your advising the Panel of this error.

Thank you for your consideration.

Very truly yours,

DAVID G. TRAGER
Assistant U.S. Attorney

By: Bernard J. Fried
Assistant U.S. Attorney
Chief, Appeals Division

cc: Ira D. London, Esq.

Eleanor Jackson Piel, Esq.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 28th day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Ira D. London, Esq.	Eleanor Jackson Piel, Esq.
547 86th Street	36 W. 44th Street
Brooklyn, N.Y. 11209	New York, N. Y. 10036

Evelyn Valenti

Sworn to before me this
28th day of Jan. 1977

Sylvia E Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977